

17 **Processing prehearing motions:** This section provides general information about processing motions that are filed after the Notice of Representation Hearing issues, but before the hearing opens.

17.1 **Generally:** Motions are filed at any time prior to the opening of the hearing. All motions made prior to a hearing and any responses are made in writing and filed with the Regional Director. Responses to such motions are filed within five (5) days after service of the motion [see § 2422.19(b)]. Copies are served on all parties. A statement of such service accompanies the original. If the Hearing Officer receives a motion from a party prior to the opening of the hearing, s/he gives the motion to the Regional Director for action.

Regional Directors have the option of ruling on all motions filed with them prior to the hearing or they may refer such motions to the Hearing Officer for ruling at the hearing with certain exceptions noted herein (see *HOG 17.4, 17.5 and 23*). When a motion is referred to the Hearing Officer, all parties are notified that the motion has been referred to the Hearing Officer. A prehearing ruling made by the Regional Director is in writing and served on the parties (see § 2422.19(b) of the regulations). All prehearing motions, any responses thereto, and any rulings by the Regional Director are made part of the record as Authority exhibits.

17.2 **Prehearing motion to postpone:** A motion for postponement of the hearing is filed with the Regional Director and a copy served on each of the other parties. The request is required to be specific as to the reason(s) for the desired postponement, and sets forth the suggested date(s) for rescheduling the hearing. The moving party is also required to ascertain in advance and set forth in the request, the respective positions of the parties regarding the request (See FLRA Document 1014 and *CHM 29.7.4*).

17.2.1 **Policy on granting prehearing motions to postpone:** Cases set for hearing are heard on the day set, and postponements are granted only for good cause shown.

17.2.2 **Granting the motion to postpone:** When the Regional Director grants a motion to postpone a representation hearing, the Regional Office notifies the reporting service immediately. A FLRA Form 48, Order Rescheduling Hearing, is also issued and served on all the parties. The following sentence is inserted immediately below the title, namely, "After due consideration of the request by the (activity) (petitioner) (intervenor)" When completing the remainder of the form, the date to which the hearing is being rescheduled is inserted. The time and place is restated in the Order even if unchanged.

17.2.3 Denying the motion to postpone: If the Regional Director denies a motion to postpone a representation hearing, the parties are notified immediately by telephone, followed by an Order Denying Motion to Postpone (see *CHM 59* for a discussion about preparing Orders).

17.2.4 Indefinite postponement: In appropriate circumstances, a Regional Director has discretion to postpone a hearing indefinitely by issuing an Order Postponing Hearing Indefinitely (see *CHM 59*). A Regional Director may order an indefinite postponement upon receipt of a motion from a party(ies) or on his/her own.

17.2.5 Resumption of indefinitely postponed hearing: An Order Rescheduling Hearing as shown in Figure C29.7C is issued and served on all parties and the reporting service where a hearing that has been postponed indefinitely is scheduled to resume.

17.3 Prehearing motions (requests) to intervene, cross-petition, challenges to the validity of the showing of interest and challenges to the status of a labor organization: The regulations provide that a motion to intervene, cross-petition, challenge to the validity of the showing of interest or challenge to the status of a labor organization may be filed at any time prior to the opening of a hearing (see §§§ 2422.8, 2422.10, and 2422.11 of the regulations), unless good cause is shown for granting an extension. If no hearing is held, a request to intervene, cross-petition, challenge the validity of a showing of interest or the status of a labor organization must be filed prior to action being taken pursuant to § 2422.30. This subsection provides an overview of these procedures. For specific guidance, see referenced chapters in the REP CHM or the HOG.

- a) *Prehearing cross-petitions or motions to intervene* are normally processed in the Regional Office in accordance with *CHM 17* as soon as they are received. Cross-petitions or motions to intervene that are received too close to the hearing to process are referred to the Hearing Officer and processed in accordance with *HOG 17.4*, *HOG 23* and *CHM 17.3*. See also *HOG script 35.5*. Cross-petitions or motions to intervene filed during the hearing are processed according to *HOG 18.4*.
- b) *Challenges to the validity of the showing of interest* are not referred to the Hearing Officer, but are handled administratively in accordance with *CHM 18.19* (challenges to the validity of the showing of interest). Challenges to the validity of the showing of

interest that are submitted to the Hearing Officer prior to the opening of the hearing or after the hearing opens are referred to the Regional Director (see *HOG 24* and *33.2*). These challenges raise threshold issues that are investigated and decided prior to issuing the Decision and Order.

c) *Challenges to the status of a labor organization* are normally processed in the Regional Office in accordance with *CHM 19*.

(i) *Timeliness*: If the challenge is filed too late to investigate and decide prior to the hearing, the Regional Director refers it to the Hearing Officer. The Hearing Officer treats such challenges to the status of a labor organization as a threshold issue about which evidence is taken before proceeding with the remainder of the hearing.

(ii) *Procedures*: The Hearing Officer discusses the issues and procedures for handling the status challenge with the Regional Director prior to opening the hearing. All supporting evidence is required to be submitted with the challenge. If the Regional Director gives the Hearing Officer permission to make a recommendation on the record regarding the challenge, the Hearing Officer takes evidence on and makes his/her recommendation in accordance with *HOG 35.13* before proceeding with the rest of the hearing. If the Regional Director does not give permission to the Hearing Officer to make a recommendation, the Hearing Officer still takes evidence on the status challenge before proceeding with the other issues (see *HOG 24.3* and *33.3*).

(iii) *Decision*: Ultimately, in either situation, the Regional Director decides the status issue as part of his/her Decision and Order, or in an election petition, may exercise the option of deferring his/her decision by issuing a Direction of Election. Status challenges that are filed after the hearing opens are untimely unless the challenging party can establish good cause for granting an extension. *HOG 24.3* provide guidance for considering status challenges filed during the hearing.

(iv) *Challenges based on claims made pursuant to section 7111(f)(1) of the Statute*: *HOG 24.3*, *RCL 10B*, *HOG 46B*, *CHM 19*, *CHM 20.1.8* and *CHM 23.9.3* provide guidance on investigating and processing status challenges based on claims that a labor organization is subject to corrupt influences or influences opposed

to democratic principles pursuant to section 7111(f) of the Statute. Challenges raised pursuant to 7111(f)(1) of the Statute do not appear to be subject to any timeliness requirements. See *Division of Military And Naval Affairs (New York National Guard), Latham, New York and National Federation of Civilian Technicians (NYNG)*, 53 FLRA 111 (1997) and *U.S. Information Agency, Washington, D.C. and American Federation of Government Employees, Local 1812, AFL-CIO, (USIA)*, 53 FLRA 999 (1997)

NOTE: Regional Directors rule on all cross-petitions, interventions, and challenges including those received too late to process prior to the hearing. Thus, Regional Directors (or their designees) are required to be available to respond to situations that arise immediately prior to or during the hearing.

17.4 Motions to intervene received too late for the region to process prior to the opening of the hearing: In accordance with § 2422.8 of the regulations, requests to intervene must be in writing and/or filed and submitted to the Regional Director or the Hearing Officer before the hearing opens, unless good cause is shown for granting an extension of time to file a request to intervene or cross-petition.

NOTE: CHM 17.3.1 discusses grounds for granting extensions and procedures for processing untimely intervention requests under such circumstances. In the event that a request to intervene is filed untimely, i.e., after the hearing opens, refer to HOG 18.4 for processing guidelines.

17.4.1 Reviewing motions to intervene received too late for the region to process prior to the opening of the hearing: Prior to opening the record, the Hearing Officer reviews a request to intervene to determine whether the request complies with § 2422.8 of the regulations. For instance, if the petition seeks an election, the intervention request must be accompanied by a showing of interest or other form of evidence as described in § 2422.8(c) unless the intervenor claims to be the incumbent [§ 2422.8(d)]. If the petition seeks to clarify or amend a matter relating to representation, a party proffers appropriate evidence of interest to support its intervention request. See generally, *CHM 17*. If necessary, the Hearing Officer delays the opening of the hearing to review the request to intervene. See also *HOG 17.4.3* and *17.4.4* for processing procedures and exceptions.

17.4.2 Considerations when reviewing the showing of interest accompanying requests to intervene or cross-petition in election proceedings that are received too late for the region to process prior to the opening of the hearing:

- a) A showing of interest is required to support any intervention request or cross-petition that is filed immediately prior to the opening of the hearing. If no evidence is proffered, the intervening party or cross-petitioner cannot participate and the hearing is not delayed (CHM 18.8).
- b) Where a request to intervene or cross-petition is based on evidence of interest made immediately prior to the opening of the hearing, the showing of interest is not examined by any other party to the proceeding and is never introduced or received into the record. Argument on the adequacy of interest is inappropriate and the Regional Director's eventual ruling on the request is based on the investigation of interest made by the Hearing Officer. The parties are reminded that adequacy of a showing of interest is an administrative matter made by the Regional Director which is not subject to collateral attack by the parties [see § 2422.9(b) of the regulations].
- c) Where requests to intervene or cross-petition are received immediately prior to the opening of a hearing, any accompanying showing of interest is checked on the spot unless the showing is voluminous and the Hearing Officer decides that it would unduly delay the hearing (see *CHM 18.13.6*). If it appears sufficient on its face, the Regional Director instructs the Hearing Officer to grant the motion to intervene, "subject to a subsequent check of the sufficiency of interest" (see *HOG 17.4.4* guidelines relating to granting "conditional intervention"). The check is usually made between sessions using the activity/agency list furnished in response to the opening letter. The Hearing Officer is authorized to announce the Regional Director's subsequent ruling on the intervention/cross-petition. If the hearing record closes before the Hearing Officer has an opportunity to check the showing of interest, the Hearing Officer [see *HOG 34.4(c)*] reports the results in the Hearing Officer's Report and an amended showing of interest report, FLRA Form 52 (see *CHM 18.15*).

- d) If the Hearing Officer's check of the showing of interest reflects that the showing is inadequate and the scope and size of the unit is not an issue in the proceeding, the Hearing Officer refers the request to intervene or cross-petition to the Regional Director. The party attempting to intervene or cross-petition is not given additional time to obtain sufficient showing of interest. The hearing is not delayed and the party requesting status as an intervenor or cross-petitioner does not participate in the hearing.
- e) If the size or scope of the unit is an issue at the hearing and the decision could affect the intervenor's or cross-petitioner's request, then the Regional Director permits the intervenor or cross-petitioner to "conditionally intervene" and participate in the proceedings. See *HOG 17.4.4*.

See also *HOG 23* for a discussion of cross-petitions filed immediately prior to the opening of the hearing.

17.4.3 *Ruling on motions to intervene prior to the opening of the hearing:* The Hearing Officer does not have the authority to grant or deny an intervention request made immediately prior to the opening of the hearing. Only the Regional Director grants or denies an intervention request. Once the Hearing Officer reviews the intervention request or cross-petition, s/he contacts the Regional Director for a decision. The Regional Director has three options: 1) grant the request; 2) deny the request; and 3) grant conditional intervention which allows the party to participate in the hearing, but reserves the Director's ruling for the Decision and Order.

17.4.3.1 *Granting a motion to intervene:* If the intervention request is simple and meets the requirements for intervention, the Hearing Officer obtains permission to name the party as an intervenor prior to opening the record. If the Regional Director grants the intervention request, the Hearing Officer allows the intervenor to enter his/her appearance on the record. See *HOG script 35.5*.

17.4.3.2 *Referring a motion to intervene to the Regional Director:* If the motion to intervene is unsupported by appropriate evidence, the Regional Director instructs the Hearing Officer to refer the motion to the Regional Director for action in accordance with § 2422.30 of the regulations. The Hearing Officer acknowledges receipt of the request to intervene or cross-petition after opening the record and then refers the motion to the Regional Director on the record with supporting statements. Absent unusual circumstances, the hearing is not postponed and the party requesting intervention is not

permitted to participate in the hearing. (See HOG Script 35.5).

17.4.4 Conditional intervention: If the intervention request is complicated or there is a question of timeliness, the Regional Director may consider an intervention request received too late for the region to process prior to the opening of the hearing as an issue for the hearing. The Regional Director grants a party “conditional intervention” only in exceptional circumstances. Factors to consider include:

- a) The showing of interest is voluminous, but the intervention is timely and otherwise appears valid.
- b) The petition is amended prior to the opening of the hearing or at the hearing and the amendment changes the scope of the unit. As a result, issues are raised relating to identifying parties affected by issues raised by the amended petition pursuant to § 2422.6 of the regulations. See *National Park Service*, 55 FLRA 466.
- c) The intervention request is complicated or timeliness is an issue, but the request otherwise appears valid rather than a frivolous attempt to disrupt the proceedings.
- d) The intervention request is filed untimely, but the Regional Director determines that the party has shown good cause for being granted an extension to the timeliness requirements and the intervention otherwise appears valid.
- e) The intervention request or cross-petition raises substantive issues that affect the issues raised in the subject proceeding.
- f) A labor organization claims that it is affected by issues raised pursuant to § 2421.21 of the regulations, but does not qualify as an intervenor or an incumbent pursuant to § 2422.8 of the regulations. The labor organization claims status as an “interested party.” See *Utah Army National Guard, U.S. Department of the Army, Draper, Utah*, an unnumbered Authority Decision denying an application for review in Case No. DE-RP-80021, (1999). See *CHM 17.13*.

By allowing conditional intervention in these extraordinary circumstances, the hearing is not delayed and the intervening party is given an opportunity to participate in the proceedings conditioned on the party satisfactorily complying with the requirements for intervention or status as an interested party. Ultimately, the Regional Director decides the intervenor’s status in the

Decision and Order. If the other parties object to handling an intervention request in this manner, their objections become part of the record. Specific instructions follow:

17.4.4.1 As part of the opening statement and after ascertaining the correct names of the known parties to the proceeding, the Hearing Officer calls attention to any prehearing motions to intervene which were received too late for the region to process prior to the opening of the hearing. The Hearing Officer also calls attention to any motions to intervene that have been filed after the hearing opens that argue that good cause has been shown for granting an extension to intervene (see *HOG script 35.5*).

17.4.4.2 If the motion to intervene is based on an existing or recently expired agreement or other documentation, a copy of the agreement or other documentation is placed into the record at the time the motion is made. If the motion is based on evidence of interest presented to the Regional Office or the Hearing Officer, the fact is noted on the record, but the numerical showing of interest is not introduced or received into evidence. Argument on the adequacy of the showing of interest is not allowed.

17.4.4.3 The Hearing Officer makes certain that the full and precise name of any intervenor or potential intervenor is placed on the record and that the record is clear regarding whether the intervenor is the local, the parent labor organization or both. Similarly, the full name of an agency or activity intervenor is also ascertained. Additionally, the Hearing Officer ensures that the intervenor places its position on the record and the basis for the intervention.

17.4.4.4 The Hearing Officer asks all other parties for their positions.

17.4.5 Handling conditional motions to intervene on the record:

17.4.5.1 If the motion to intervene was filed timely and appears sufficient or justified under the circumstances discussed in *HOG 17.4.4*, then the Hearing Officer states that the Regional Director is granting the motion, "subject to a subsequent check of the sufficiency of the showing of interest," where necessary, or if showing of interest was not the basis for the intervention, "subject to the evidence adduced during the hearing."

17.4.5.2 If the Hearing Officer has any doubt regarding the propriety of permitting intervention in any instance, s/he recesses the hearing for a time sufficient to enable him/her to resolve the doubt by contacting the Regional Director or by other appropriate means. The Regional Director grants conditional

intervention only in exceptional circumstances. If the Regional Director decides to allow conditional intervention, the Director instructs the Hearing Officer to make it clear, however, that although “conditional intervention” is granted, the final decision is being reserved for the Regional Director in his/her Decision and Order.

- 17.5** **Prehearing motions to dismiss:** Prehearing motions to dismiss are ruled on by the Regional Director and are not referred to the Hearing Officer. Normally such motions are deferred for ruling until such time as the Regional Director issues the Decision and Order following the hearing. If the Regional Director grants a motion to dismiss a petition in a Decision and Order, the petitioner may file an application for review with the Authority. If the Regional Director denies a motion to dismiss, the decision is not subject to appeal unless it is made part of the Decision and Order.
- 17.6** **Prehearing motions to withdraw:** See *HOG 19*.
- 17.7** **Other prehearing motions:** Other motions, such as motions to change the location of the hearing, are processed in accordance with *HOG 17.1*.
- 17.8** **Orders:** If the notice of hearing was issued without a time or location or is amended, an appropriate Order is issued by the Regional Director (see Figure C29.7B). See also *CHM 59* for general guidance in preparing orders.

